IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	)	
	)	
DARRYL BRENT JOHNSON, JR.,	)	**Supreme Court #SC93707**
	)	
Respondent.	)	

INFORMANT'S BRIEF

OFFICE OF
CHIEF DISCIPLINARY COUNSEL

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INFORMANT

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STATEMENT OF JURISDICTION

Jurisdiction over attorney discipline matters is established by Article 5, Section 5 of the Missouri Constitution, Supreme Court Rule 5, this Court's common law, and Section 484.040, R.S.Mo. 2000.

STATEMENT OF FACTS

PROCEDURAL HISTORY

January 2, 2013	Information
January 9, 2013	Respondent's Answer to Information
February 1, 2013	Appointment of Disciplinary Hearing Panel
March 7, 2013	Replacement Disciplinary Hearing Panel Member Appointed
July 10, 2013	DHP Hearing
July 30, 2013	DHP Decision
August 19, 2013	Rejection of DHP decision by Informant
October 4, 2013	Partial Record Submitted
October 4, 2013	Informant Motion for Extension of Time to Complete Record and Motion to Stay Briefing Schedule until Record is Complete
October 4, 2013	Court Order Sustaining Informant's Motions. Transcript of Proceedings Due on or Before November 8, 2013. Briefing Schedule Stayed until November 9, 2013
November 8, 2013	Informant's Submission of Complete Record
November 18, 2013	Informant's Motion to Supplement Record with DHP Hearing Exhibits
November 19, 2013	Supplemental Record Filed

BACKGROUND

Respondent Johnson first arrived in Missouri in 1992 while on active duty with the United States Army. He moved to Springfield, Missouri in January 1994 and was licensed to practice law in this state in April 1994. **App. 32 (Tr. 60).**[1] In 1997, Respondent joined his wife, Lynn Plaisance Johnson, in the practice of law. The name of the law firm was changed to Johnson & Johnson. **App. 32 (Tr. 61).** Respondent's license is in good standing and he has no disciplinary history.

THE DANELS REPRESENTATION

Gayle Danels first met with Respondent in February 2009 to discuss the dissolution of marriage from her husband. Danels' father accompanied her to the meeting with Respondent. At the meeting, Respondent discussed how the litigation would proceed. He acted professionally and Danels' father told her that he thought Respondent would do a good job for her. **App. 49 (Tr. 130).** Danels retained Respondent on May 5, 2009 to represent her in a dissolution of marriage. The agreed

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[1] The facts contained herein are drawn from the testimony elicited and the exhibits admitted into evidence at the trial in this matter conducted on July 10, 2013. Citations to the trial testimony before the Disciplinary Hearing Panel are denoted by the appropriate Appendix page reference followed by the specific transcript page reference in parentheses, for example **"App. ___ (Tr. ___)"**. Citations to the Information, Respondent's Answer to the Information and trial exhibits are denoted by the appropriate Appendix page reference.

upon fee was $1,500, which Danels paid over the course of several weeks. **App. 49-50 (Tr. 130-131); 318-320.**

A second meeting between Danels and Respondent to discuss the representation was held in May 2009, after Danels had paid the required fee. **App. 50 (Tr. 131).** Only Respondent and Danels were present for this meeting, which lasted between 30 and 45 minutes. **App. 50 (Tr. 131-132).** Danels described Respondent's demeanor during this meeting as more relaxed and humorous. **App. 50 (Tr. 133).** During the meeting, Respondent showed Danels photographs of naked women and made crude comments to Danels regarding his sexual preferences. **App. 50 (Tr. 132-133).** According to Danels, Respondent explained as follows:

> "He mentioned the fact that it helped in the cases, that they were taken of, they were like from the internet. He told me if I had any internet pictures, if I could get any pictures of my soon-to-be-ex-husband and I together, that it would help my case, sexually together, it would help my case." **App. 50 (Tr. 132).**

Respondent also showed Danels an autographed picture of a naked stripper that he had been given while at a strip club. The picture was signed "To Darryl." **App. 50 (Tr. 133-34).**

Respondent admits showing Danels photographs of naked women and described the conduct as a "common practice" that he utilizes so that his clients will know what to expect during the course of a dissolution proceeding. **App. 58 (Tr. 164-166).** Respondent denies making any lewd statements to Danels and denies ever showing her a photograph of a stripper. **App. 58 (Tr. 166).**

Respondent did not explain to Danels how the pictures were related to her case. Danels thought that the pictures were "weird" and they made her feel "uncomfortable". Danels trusted Respondent because he was an authority figure to her. **App. 50-51 (Tr. 134, 136).** Danels allowed Respondent to continue to represent her because she had paid his fee and had no more money with which to retain other counsel. **App. 51 (Tr. 135-36).**

Respondent and Danels went to court on her dissolution on May 25, 2010. Following the appearance, Danels was not satisfied with the Court's ruling in the case and Respondent suggested further court proceedings. Danels told Respondent that she had no more money with which to pay him. Respondent "looked me up and down" and stated "I'm sure we can figure something out." Following that incident, Danels terminated Respondent's representation and proceeded to represent herself without counsel for the remainder of her dissolution case. **App. 50-51 (Tr. 134-35, 136-37).**

At the time that the representation ended, Danels owed money to Respondent for the attorney's fees incurred on her behalf. **App. 59 (Tr. 169-170), 338-341.** Ultimately, Respondent hired a collection agency to collect the unpaid fee from his client. **App. 54 (Tr. 148-149), 342.** Danels filed her complaint against Respondent with the OCDC after Respondent's collection efforts commenced. **App. 54 (Tr. 149), 65-66.**

RESPONDENT'S TRUST ACCOUNT

On August 16, 2011, Informant received a notification from Liberty Bank that Respondent's trust account was overdrawn in the amount of $4,925.70 as a result of the payment of a check in the amount of $5,246.20. **App. 19-20 (Tr. 10-11), 168-170.**

Informant sent Respondent a letter asking for an explanation for the overdraft of the trust account. **App. 19-20 (Tr. 10-11), 168-170.** Respondent's bookkeeper replied to Informant's letter and advised that the overdraft resulted from an error in electronic transfers between accounts operated by Respondent. **App. 20, 32-33 (Tr. 11, 62-63).**

Attorney Lori Levine initially entered her appearance on behalf of Respondent during the OCDC's investigation of the trust account overdraft. Ms. Levine conceded that Respondent was using an improper accounting method for the handling of advance fee payments by clients. **App. 25 (Tr. 34), 171-174.** In order to immediately address the issue, Informant suggested that Respondent attend continuing legal education courses regarding the proper handling of client trust accounts. **App. 25 (Tr. 34).**

Informant conducted a further investigation regarding Respondent's handling of both his law firm's operating account and trust account. The investigation included a review of bank records regarding Respondent's operating and trust accounts, client billing ledgers reflecting fees paid by clients to Respondent, and settlement documents from cases settled by Respondent on behalf of clients for a period from January 1, 2011 through October 18, 2011. **App. 20-21, 24 (Tr. 14-17, 27), 175-222.** Once all required documents were received, Informant reviewed all banking transactions from Respondent's operating and trust accounts and entered them onto a spreadsheet so that they could be compared against client ledgers and billings. **App. 21 (Tr. 16-17), 175-222.** As a result of this investigation, Informant discovered the following instances where Respondent placed clients' advance fee payments into his operating account instead of his trust account:

- $2,000 received from Adamase Ismayer;
- $1,400 received from Rebecca Argulagos;
- $1,500 received from Courtney Vanoy;
- $2,500 received from Donna and Jay Christian;
- $2,000 received from Mandy and Jeffrey Warner;
- $2,000 received from Felicia Vasquez;
- $750 received from Melissa Aquin;
- $900 received from Brandon Nook;
- $2,250 received from Florine McNeal;
- $1,500 received from Luella Wilson;
- $2,000 received from Mike Schupbach.

App. 22-23 (Tr. 20-26), 177-222.

Informant examined Respondent's client billing and related records. **App. 24 (Tr. 28), 223-275.** Informant's investigation demonstrated that Respondent regularly utilized his operating account for the payment of personal, business and client expenses without regard to whether the funds expended were client funds. **App. 24-25 (Tr. 30-31), 276-302.** There was no indication from Informant's investigation that Respondent had misappropriated any client funds. **App. 27 (Tr. 41).** In addition, Respondent soon brought his client trust account to the appropriate balance by transferring funds from the operating account to the trust account. **App. 26 (Tr. 37).**

Respondent concedes that he was "screwing up" in the handling of advance fee payments from clients by placing such funds into the law firm's operating account. **App. 33 (Tr. 64).** Respondent states that he took corrective action by attending a continuing legal education seminar on trust accounting and purchasing a new computer software program to assist in managing the law firm's operating and trust accounts. **App. 33 (Tr. 64).**

THE RAY REPRESENTATION

John Ray was divorced from his ex-wife in 2008. There were two minor children from the marriage with whom Ray shared joint custody. Ray remained active in the children's lives, attending all school and extracurricular activities. Ray, his ex-wife and the children from that marriage resided in Ozark, Missouri. **App. 38-39 (Tr. 86-88).**

In September 2010, Ray met with Respondent regarding the possibility that his ex-wife might seek to relocate with the minor children at some future time. **App. 39, 42 (Tr. 89, 101).** Ray did not retain Respondent at that time. At the September 2010 meeting, Respondent informed Ray that it would be highly unlikely that his ex-wife would be able to relocate due to the fact that Ray was actively involved with the children's care. **App. 39 (Tr. 89-90).**

On January 22, 2011, Ray received written notification from his ex-wife that she desired to relocate herself and the children a significant distance from Ozark, to Platte City, Missouri. **App. 39, 42 (Tr. 88, 99-100).** Under state law, Ray had thirty (30) days in which to object to the relocation. **App. 26-27 (Tr. 38-40), 67-69.** Ray contacted Respondent's law office on February 11, 2011 regarding the notification and ultimately

was able to speak with Respondent by teleconference on February 15, 2011. **App. 40 (Tr. 91-92).** Ray informed Respondent that he had received the notification of intent to relocate and wanted to make sure that adequate time remained in which to object. Respondent told Ray that there was plenty of time and that his fee for the representation would be $2,000. At the end of the teleconference, Ray felt confident that he had a strong case to oppose the relocation and that there was ample time for Respondent to file a response objecting to the relocation. **App. 40 (Tr. 91-92).**

The next day, February 16, 2011, Ray paid the agreed upon fee and signed the Attorney-Client Agreement. **App. 40 (Tr. 93-94), 164-166.** The Agreement described the services to be performed by Respondent as "Motion to Modify/Objection to Relocation." **App. 164-166.** Ray gave Respondent the relocation letter that he had received from his wife and left the office under the assumption that everything would be taken care of by Respondent. **App. 40 (Tr. 94).**

Respondent testified that Ray never gave him the relocation letter from his ex-wife and that he did not realize the fact that the time to object to the relocation was about to run. **App. 46 (Tr. 115-116).** Respondent acknowledged, however, that he knew that the relocation of Ray's children was at issue, that he made errors in the handling of the representation and that he was "sloppy" in not acting in a more timely fashion. **App. 46 (Tr. 116).**

On March 9, 2011, Ray went to Respondent's office and signed the Motion to Modify and Objection to Relocation. Ray assumed that the pleadings were timely and would be filed soon thereafter. **App. 41 (Tr. 96-97).**

Ray subsequently learned that the Court had dismissed the Motion to Modify and Objection to Relocation as untimely. **App. 41 (Tr. 97-98).** Ray called Respondent's office and was notified by a paralegal that Respondent had missed the deadline to object to the relocation. **App. 41 (Tr. 98).** Ray was unable to speak with Respondent regarding the matter. **App. 41 (Tr. 98).** Ray later learned that his ex-wife had filed a motion to dismiss his pleadings and had set her motion for hearing in April 2011. Respondent failed to notify Ray that the motion had been filed or that it was set for hearing. **App. 42 (Tr. 99).**

Following the Court's ruling, Ray retained new counsel to file a motion for reconsideration. The Court denied the motion and Ray's ex-wife soon moved with the children to Platte City, Missouri. As a result, Ray saw his children less frequently than he had when they resided in Ozark, Missouri. **App. 42 (Tr. 99-100).** In order to avoid again uprooting his children, Ray eventually abandoned his objection to the relocation and settled the pending disputes with his ex-wife. **App. 44 (Tr. 107-108).**

Ray never requested any refund of the $2,000 attorney's fee paid to Respondent for the representation and Respondent never refunded any portion of the fee. **App. 44, 47 (Tr. 109, 119).**

THE ARNOLD MATTER

Respondent represented Katherine Arnold and filed a dissolution of marriage petition against her husband, Christoph Arnold, on February 28, 2011. Respondent was having difficulty serving Mr. Arnold and had a member of his office staff appointed as a special process server to obtain service. **App. 37 (Tr. 81).**

On or about June 30, 2011, Mr. Arnold contacted Respondent's law office to schedule an appointment regarding representation in the dissolution of his marriage from his wife from whom he had been separated since September 2010. Mr. Arnold spoke with Respondent's paralegal and gave her basic contact information, including his full name, address, cell phone number, and the fact that he was seeking representation in a dissolution action. **App. 34 (Tr. 68-69).** An appointment for Mr. Arnold to meet with Respondent was scheduled for July 7, 2011. **App. 34 (Tr. 69).**

On July 7, Mr. Arnold arrived at Respondent's law office and was given an information form to complete by the receptionist. **App. 34 (Tr. 70).** Mr. Arnold completed the information form, including the fact that he was seeking representation with regard to a divorce from his wife. He provided his wife's name on the form, gave it back to the receptionist and sat back down in anticipation of meeting with Respondent. **App. 35 (Tr. 71-72).**

Soon thereafter, a staff person came out from the office into the waiting room, asked Mr. Arnold to identify himself, and served him with the Petition for Divorce filed by his wife. **App. 35 (Tr. 72).** Prior to being served by a member of Respondent's staff, Mr. Arnold did not know that his wife had already filed for dissolution of their marriage. **App. 35 (Tr. 72).**

Neither Respondent nor his staff ever notified Mr. Arnold that Respondent already represented his wife in the dissolution action or that Respondent could not represent him due to a conflict of interest. **App. 35 (Tr. 72-73).**

Respondent acknowledged that Mr. Arnold was a prospective client and that his office staff had not followed established procedures for completing a conflicts check prior to scheduling the July 7 appointment. **App. 37, 38 (Tr. 80-81, 83-84).** Although Respondent had been having difficulty in serving Mr. Arnold with the divorce petition, he testified that he never instructed the office staff to serve Mr. Arnold in Respondent's waiting room and that the office staff "took it upon themselves to have him served." **App. 37, 38 (Tr. 81, 84).**

Respondent testified that he did not meet with Mr. Arnold on July 7, 2011, that he never spoke with Mr. Arnold on the telephone and that he never gave any advice to Mr. Arnold nor accepted any fee from Mr. Arnold. **App. 37 (Tr. 79-80).** Respondent acknowledged that he could not have represented Mr. Arnold due to the conflict of interest created by his representation of Mr. Arnold's wife. **App. 37 (Tr. 82).**

THE DISCIPLINARY HEARING PANEL DECISION

On July 30, 2013, the Disciplinary Hearing Panel filed its decision recommending that this Court reprimand Respondent. **App. 358-360.** In so recommending, the Panel made the following findings of fact and conclusions of law:

- The Panel found that Respondent showed photographs depicting nude breasts of females to a female client without a prior request or permission from the client. The Panel found that this conduct, while not a direct violation of Rule 4-1.7 or Rule 4-1.8(j), was not reasonably necessary to the representation of the client and posed a substantial risk that the client would perceive the purpose of the display as done for personal purposes of the lawyer. As such, the conduct exhibited a failure

to recognize that the lawyer occupies the "highest position of trust and confidence" toward the client and must "exercise sensitive professional and moral judgment guided by the basic principles underlying the Rules." *Citing* Rule 4-1.8, Comment 17 and Rule 4, Preamble, para. 9.

- The Panel found that the overdraft of Respondent's client trust account occurred as a result of a misunderstanding by Respondent's law office of the functioning of the software for electronic transfers between accounts. The Panel found that Respondent did not have procedures in place to comply with the requirements of Rule 4 for handling money. As a consequence, some advanced legal fees and other funds received on behalf of clients were deposited directly into Respondent's operating account. Upon notice, the Panel found that Respondent corrected his office procedures to comply with Rule 4 and educated his personnel to the requirements of the rules. The Panel found that Respondent violated Rule 4-1.15(c) by commingling personal funds and client funds in his operating account.
- The Panel found that Respondent failed to timely file a Motion to Prevent the Relocation of John Ray's minor children by his ex-wife, resulting in the dismissal of said Motion by the Court. The Panel found that this conduct violated Rule 4-1.3, diligence.
- The Panel found that Respondent failed to communicate with John Ray regarding the fact that a hearing was scheduled in court regarding the motion to dismiss filed by Ray's ex-wife. The Panel found that this conduct violated Rule 4-1.4, communication.

- The Panel found that Respondent failed to provide competent representation to Mr. Ray with regard to the effort to defeat ex-wife's notification of intent to relocate. The Panel found that this conduct violated Rule 4-1.4, communication.[2]
- The Panel found that no evidence existed that Respondent had knowledge that Christoph Arnold had an appointment to meet with Respondent or that Respondent directed his office staff to serve Mr. Arnold with his wife's Petition for Dissolution. The Panel also found no evidence that Mr. Arnold was harmed by the actions of Respondent's office staff. The Panel found no violations with regard to this charge.

The Panel recommended that Respondent be reprimanded for his misconduct. Informant rejected the Panel's recommendation. **App. 362.**

[2] The language of the DHP decision would suggest that the Panel meant to find a violation of Rule 4-1.1, competence, which was one of the rule violations charged in Count III of the Information.

POINT RELIED ON

I.

RESPONDENT VIOLATED THE RULES OF PROFESSIONAL CONDUCT BY:

(A) EXPRESSING SEXUAL INTEREST IN HIS CLIENT THEREBY CREATING A CONCURRENT CONFLICT OF INTEREST IN VIOLATION OF RULE 4-1.7(a)(2) SINCE THERE WAS A SIGNIFICANT RISK THAT HIS REPRESENTATION OF HIS CLIENT WOULD BE MATERIALLY LIMITED BY HIS PERSONAL INTERESTS;

(B) DEPOSITING CLIENT ADVANCE FEE PAYMENTS INTO HIS OPERATING ACCOUNT AND THEREBY COMMINGLING CLIENT FUNDS WITH HIS PERSONAL FUNDS IN VIOLATION OF RULE 4-1.15(c);

(C) FAILING TO COMPETENTLY AND DILIGENTLY REPRESENT THE INTERESTS OF HIS CLIENT BY TIMELY FILING A MOTION TO PREVENT THE RELOCATION OF HIS CLIENT'S MINOR CHILDREN IN VIOLATION OF RULES 4-1.1 AND 4-1.3 AND BY FAILING TO ADEQUATELY COMMUNICATE WITH HIS CLIENT REGARDING THE MATTER IN VIOLATION OF RULE 4-1.4; AND

(D) BY DIRECTING OR PERMITTING HIS LAW OFFICE STAFF TO USE INFORMATION GAINED FROM A PROSPECTIVE CLIENT TO THE PROSPECTIVE CLIENT'S DISADVANTAGE IN VIOLATION OF RULES 4-5.3 AND 4-8.4(a).

In re Howard, 912 S.W.2d 61 (Mo. banc 1995)

In re Crews, 159 S.W.2d 355, 358 (Mo. banc 2005)

In re Shelhorse, 147 S.W.3d 79, 80 (Mo. banc 2004)

In re Oliver, 365 S.W.2d 648, 655 (Mo. banc 1956)

Rule 4-1.7(a)(2)

Rule 4-1.15(c)

Rule 4-5.3

II.

SUSPENSION IS THE APPROPRIATE SANCTION IN THIS CASE WHERE RESPONDENT JOHNSON ENGAGED IN A SERIES OF ETHICAL VIOLATIONS INVOLVING BOTH HIS MISTREATMENT OF CLIENTS AND THE MISHANDLING OF HIS CLIENTS' ADVANCE FEE PAYMENTS BECAUSE:

A. THE ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS SUGGEST SUSPENSION AS THE APPROPRIATE SANCTION; AND

B. THE COURT HAS RULED THAT ATTORNEYS WHO ENGAGE IN MISCONDUCT SUCH AS THAT PRESENT IN THIS CASE SHOULD BE SUSPENDED.

In re Howard, 912 S.W.2d 61 (Mo. banc 1995)

In re Wiles, 107 S.W.3d 228 (Mo. banc 2003)

In re Coleman, 295 S.W.3d 857 (Mo. banc 2009)

ABA Standards for Imposing Lawyer Sanctions (1991 ed.)

ARGUMENT

I.

RESPONDENT VIOLATED THE RULES OF PROFESSIONAL CONDUCT BY:

A. EXPRESSING SEXUAL INTEREST IN HIS CLIENT THEREBY CREATING A CONCURRENT CONFLICT OF INTEREST IN VIOLATION OF RULE 4-1.7(a)(2) SINCE THERE WAS A SIGNIFICANT RISK THAT HIS REPRESENTATION OF HIS CLIENT WOULD BE MATERIALLY LIMITED BY HIS PERSONAL INTERESTS;

B. DEPOSITING CLIENT ADVANCE FEE PAYMENTS INTO HIS OPERATING ACCOUNT AND THEREBY COMMINGLING CLIENT FUNDS WITH HIS PERSONAL FUNDS IN VIOLATION OF RULE 4-1.15(c);

C. FAILING TO COMPETENTLY AND DILIGENTLY REPRESENT THE INTERESTS OF HIS CLIENT BY TIMELY FILING A MOTION TO PREVENT THE RELOCATION OF HIS CLIENT'S MINOR CHILDREN IN VIOLATION OF RULES 4-1.1 AND 4-1.3 AND BY FAILING TO ADEQUATELY COMMUNICATE WITH HIS CLIENT REGARDING THE MATTER IN VIOLATION OF RULE 4-1.4; AND

(D) BY DIRECTING OR PERMITTING HIS LAW OFFICE STAFF TO USE INFORMATION GAINED FROM A PROSPECTIVE CLIENT TO THE PROSPECTIVE CLIENT'S DISADVANTAGE IN VIOLATION OF RULES 4-5.3 AND 4-8.4(a).

It is well settled that a Disciplinary Hearing Panel's recommendations are advisory in nature. *In re Crews*, 159 S.W.3d 355, 358 (Mo. banc 2005). In a disciplinary proceeding, this Court reviews the evidence *de novo*, independently determining all issues pertaining to credibility of witnesses and the weight of the evidence, and draws its own conclusions of law. *Id.* Discipline will not be imposed unless professional misconduct is proven by a preponderance of the evidence. *Id*. Where misconduct is proven by a preponderance of the evidence, violation of the Rules of Professional Conduct by an attorney is grounds for discipline. *In re Shelhorse*, 147 S.W.3d 79, 80 (Mo. banc 2004). There exists ample evidence to find various violations of the Rules by Respondent in the management of his law office as well as in his handling of various client matters.

Respondent violated Rule 4-1.7(a)(2) by showing his client lewd photographs and by making suggestive sexual comments to her. Gayle Danels retained Respondent to represent her in connection with the dissolution of marriage from her husband. After paying the required fee, Respondent and Danels met privately in his office to discuss her case. During the course of that meeting, Respondent showed Danels photographs of naked women and made crude comments to her regarding his sexual preferences. He showed Danels an autographed picture of a naked stripper that he had been given while at

a strip club. In a later meeting following an unsuccessful court appearance, after Danels stated that she had no more money with which to pay for further court proceedings, Respondent stated "I'm sure we can figure something out." Danels thought the photographs were "weird" and Respondent's comments made her feel "uncomfortable". She ultimately terminated the attorney-client relationship and proceeded to represent herself *pro se* in the dissolution proceedings.

In *In re Howard*, 912 S.W.2d 61 (Mo banc 1995), this Court found that an attorney violated Rule 4-1.7 by making unwanted sexual advances toward two clients that undermined the clients' faith in his services, interfered with his independent professional judgment and adversely affected the representations. *Id*. at 62. By engaging in such conduct, the attorney created a conflict of interest between the client's interests and the personal interests of the clients. The Court noted that the relation between an attorney and his client is highly fiduciary and of a very delicate, exacting and confidential character, requiring a very high degree of fidelity and good faith on the attorney's part. *Id*. at 62, citing *In re Oliver*, 365 S.W.2d 648, 655 (Mo. banc 1956).

Similar circumstances to those present in *Howard* exist in this case. By engaging in unwanted sexual advances, Respondent undermined Danels' faith in his continued services and adversely affected the representation. She characterized his conduct as "weird" and "uncomfortable" and ultimately terminated the attorney-client relationship, even though it meant that she would thereafter be forced to represent herself without the benefit of legal counsel for the remainder of the dissolution proceedings.

Respondent admits showing Danels photographs of naked women and described the conduct as a "common practice" that he utilizes so that his clients will know what to expect during the course of a dissolution proceeding. **App. 58 (Tr. 166).** Respondent denies making any lewd statements to Danels and denies ever showing her a photograph of a stripper. **App. 58 (Tr. 166).**

The Panel was critical of Respondent's conduct, finding that it was not reasonably necessary to the representation of Danels and that it posed a substantial risk that the client would perceive the purpose of the display as done for the personal purposes of the Respondent. The Panel, however, did not find a violation of Rule 4-1.7(a)(2). **App. 360.**

Informant respectfully disagrees with the Panel's conclusion. While a factual dispute certainly exists between the parties regarding the Respondent's conduct and motives, Informant believes that the circumstantial evidence suggests that Danels' version of events is more credible than that of the Respondent. In this regard, there is no disputing the fact that Danels found Respondent's conduct sufficiently disturbing that she decided to terminate the attorney-client relationship and represent herself in the dissolution litigation.

Informant believes that Respondent violated Rule 4-1.7(a)(2) by making unwanted sexual advances toward his client and thereby creating a conflict of interest between the client's interests and the Respondent's personal interests.

Respondent violated Rule 4-1.15(c) by placing trust funds in his operating account and commingling them with his personal funds. There is clear evidence that Respondent routinely commingled trust funds with personal funds in his operating account. During a

ten month period from January 1, 2011 through October 18, 2011, Respondent placed at least the following clients' advance fee payments into his operating account:

- $2,000 received from Adamase Ismayer;
- $1,400 received from Rebecca Argulagos;
- $1,500 received from Courtney Vanoy;
- $2,500 received from Donna and Jay Christian;
- $2,000 received from Mandy and Jeffrey Warner;
- $2,000 received from Felicia Vasquez;
- $750 received from Melissa Aquin;
- $900 received from Brandon Nook;
- $2,250 received from Florine McNeal;
- $1,500 received from Luella Wilson; and
- $2,000 received from Mike Schupbach.

App. 22-23 (Tr. 20-26), 177-222.

Respondent concedes that he was "screwing up" in the handling of advance fee payments from his clients by placing such funds into the law firm's operating account. **App. 33 (Tr. 64).** In addition, Respondent regularly utilized his operating account for the payment of personal, business and client expenses. **App. 24-25 (Tr. 30-31), 276-302.**

Accordingly, there is no dispute that the evidence supports the Panel's finding of a violation of Rule 4-1.15(c), which requires a lawyer to segregate client funds from the lawyer's own funds by placing client funds in a trust account.

Respondent violated the competence (Rule 4-1.1), diligence (Rule 4-1.3) and communication (Rule 4-1.4) rules in his representation of John Ray. John Ray retained Respondent to represent him after receiving notification from his ex-wife that she desired to relocate with Ray's minor children from Ozark to Platte City, Missouri. The purpose for the representation, for which Ray paid Respondent a $2,000 attorney's fee, was to file an objection to the relocation.

It is undisputed that Respondent failed to file the required objection on behalf of his client within the time frame required by the applicable state statute. Respondent acknowledged that he knew that the relocation of Ray's children was at issue, that he made errors in the handling of the representation and that he was "sloppy" in not acting in a more timely fashion. **App. 46 (Tr. 116).** Respondent's neglect of the representation on behalf of his client violated Rule 4-1.1 (competence) and Rule 4-1.3 (diligence).

In addition to the obvious neglect, Respondent failed to communicate with Ray regarding his failure to timely file the pleading objecting to the ex-wife's relocation. In addition, Respondent failed to advise his client regarding significant developments in the case, namely, that Ray's ex-wife had filed a motion to dismiss his objections as untimely and that the motion was set for hearing before the trial court. Respondent's failure to communicate violated Rule 4-1.4.

Respondent violated Rule 4-1.18 and Rule 4-5.3 by either permitting or directing his office staff to serve a prospective client with service of process in a case where he already represented the adverse party. The following facts are undisputed:

- Respondent represented Katherine Arnold and on February 28, 2011 filed a dissolution of marriage petition against her husband, Christoph Arnold. Respondent was having difficulty serving Mr. Arnold and had a member of his office staff appointed as a special process server to obtain service. **App. 37 (Tr. 81).**
- On or about June 30, 2011, Mr. Arnold contacted Respondent's law office to schedule an appointment regarding possible representation in the dissolution action filed by Respondent on February 28, 2011. Mr. Arnold spoke with Respondent's paralegal and gave her basic contact information, including his full name, address, cell phone number and the fact that he was seeking representation in a dissolution action. **App. 34 (Tr. 68-69).** An appointment for Mr. Arnold to meet with Respondent was scheduled for July 7, 2011. **App. 34 (Tr. 69).**
- On July 7, Mr. Arnold arrived at Respondent's law office and was given an information form to complete by the receptionist. **App. 34 (Tr. 70).** Mr. Arnold completed the information form, including the fact that he was seeking representation with regard to a divorce from his wife. He provided his wife's name on the form, gave it back to the receptionist and sat back down in anticipation of meeting with Respondent. **App. 35 (Tr. 71-72).**
- Soon thereafter, a staff person came out from the office, asked Mr. Arnold to identify himself, and served him with the Petition for Divorce filed by his wife. **App. 35 (Tr. 72).** Prior to being served by a member of Respondent's staff, Mr.

Arnold did not know that his wife had already filed for dissolution of their marriage. **App. 35 (Tr. 72).**

Once Christoph Arnold contacted Respondent's office to discuss the possibility of Respondent representing him in the dissolution of his marriage from his wife, Mr. Arnold became a "prospective client" under Rule 4-1.18. As a prospective client, Mr. Arnold was the beneficiary of many of the same protections as any of Respondent's clients, chief among them being the fact that Respondent was prohibited by Rule 4-1.18(b) from using information learned from Mr. Arnold against the interests of Mr. Arnold. By directing or permitting his office staff to serve Mr. Arnold with his client's petition for dissolution of marriage while Mr. Arnold sat in Respondent's outer office waiting to meet with Respondent, Respondent violated Rule 4-1.18.

Respondent acknowledged that Mr. Arnold was a prospective client and that his office staff had not followed established procedures for completing a conflicts check prior to scheduling the July 7 appointment. **App. 38 (Tr. 83-84).** Although Respondent had been having difficulty in serving Mr. Arnold with the divorce petition, he testified that he never instructed the office staff to serve Mr. Arnold in Respondent's waiting room and that the office staff "took it upon themselves to have him served."[3] **App. 37-38 (Tr.**

[3] While the Disciplinary Hearing Panel found that Mr. Arnold was served with service of process at the direction of Respondent's office personnel, the Panel found that there was no evidence that the office staff acted with the knowledge or at the direction of Respondent. As a result, the Panel found no ethical violation on the part of Respondent.

81-84). Respondent testified that he did not meet with Mr. Arnold on July 7, 2011, that he never spoke with Mr. Arnold on the telephone and that he never gave any advice to Mr. Arnold nor accepted any fee from Mr. Arnold. **App. 37 (Tr. 79-80).** Respondent acknowledged that he could not have represented Mr. Arnold due to the conflict of interest created by his representation of Mr. Arnold's wife. **App. 37 (Tr. 82).**

Even if the office staff served Mr. Arnold without the knowledge or consent of Respondent, Respondent nevertheless violated Rule 4-5.3(b) by failing to make reasonable efforts to ensure that his staff's conduct was compatible with Respondent's professional obligations. In addition, Respondent violated Rule 4-5.3(c) by failing to take reasonable remedial action once he learned that his staff had acted in a manner toward a prospective client that Respondent himself could not have undertaken.

II.

SUSPENSION IS THE APPROPRIATE SANCTION IN THIS CASE WHERE RESPONDENT JOHNSON ENGAGED IN A SERIES OF ETHICAL VIOLATIONS INVOLVING BOTH HIS MISTREATMENT OF CLIENTS AND THE MISHANDLING OF HIS CLIENTS' ADVANCE FEE PAYMENTS BECAUSE:

A. THE ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS SUGGEST SUSPENSION AS THE APPROPRIATE SANCTION; AND

B. THE COURT HAS RULED THAT ATTORNEYS WHO ENGAGE IN MISCONDUCT SUCH AS THAT PRESENT IN THIS CASE SHOULD BE SUSPENDED.

In determining a sanction for attorney misconduct, this Court historically relies on various sources. First and foremost, the Court applies its own standards to maintain consistency, fairness, and ultimately, to accomplish the well-established goal of protecting the public and maintaining the integrity of the profession. Those standards are written into law, of course, when the Court issues opinions in attorney discipline cases. *In re Kazanas*, 96 S.W.3d 803, 808 (Mo. banc 2003).

For additional guidance, the Court frequently relies on the ABA's Standards for Imposing Lawyer Sanctions (1991 ed.). Those guidelines recommend baseline discipline for specific acts of misconduct, taking into consideration the duty violated, the lawyer's mental state (level of intent), and the extent of injury or potential injury, *In re Griffey*,

873 S.W.2d 600 (Mo. banc 1994). Once the baseline guideline is known, the ABA Standards allow consideration of aggravating and mitigating circumstances. ABA Standards for Imposing Lawyer Sanctions (1991 ed.).

The Court also considers the recommendation of the Disciplinary Hearing Panel who heard the case. In this instance, the Panel recommended that Respondent be reprimanded for his misconduct. **App. 358-360.** Informant rejected the Panel's recommendation and does not believe that it adequately addresses the rule violations present in this case.

The Missouri Standard

It is well settled that the nature of a lawyer's profession necessitates the utmost good faith and the highest loyalty and devotion to his client's interests. "The relation between attorney and client is fiduciary and binds the attorney to a scrupulous fidelity to the cause of the client which precludes the attorney from any personal advantage from the abuse of that reposed confidence." *Shaffer v. Terrydale Management Corporation*, 648 S.W.2d 595, 605 (Mo.App. 1983).

This Court has had prior opportunities to address several of the issues in this case, including the appropriate sanction for attorneys found to have made unwanted sexual advances towards a client. In *In re Howard*, 912 S.W.2d 61 (Mo. banc 1995), the attorney engaged in suggestive sexual misconduct toward two clients. This Court utilized a conflict of interest analysis, finding that Howard's actions created a conflict between the clients' interests and the lawyer's self-interest, undermined the client's faith in the

lawyer's services, and violated Rule 4-1.7. The Court suspended Howard indefinitely with leave to apply for reinstatement after six months.

In the case at bar, Respondent showed his client photographs of naked women, made crude comments to her and suggested that he would accept sexual favors in lieu of attorney's fees. As in the *Howard* case, Respondent's conduct undermined her faith in his legal services; she ultimately terminated the attorney-client relationship and decided instead to represent herself pro se in her dissolution case. Respondent's violation of Rule 4-1.7 warrants a suspension.[4]

Respondent's undisputed violation of the safekeeping property rule is likewise a serious violation that warrants at least a stayed suspension with probation. He regularly placed clients' advance fee payments into his operating account instead of his trust account, thereby commingling client funds with his own monies. Respondent concedes that he was mishandling advance fee payments from clients, but states that he has taken corrective action by attending a continuing legal education seminar on trust accounting and by purchasing a new computer software program to assist in managing his law firm's operating and trust accounts.

There are two reported decisions where the Court has ordered probation to address professional misconduct. In the first case, the Court ordered probation for Missouri

[4] Even if the Court accepts Respondent's strained explanation that he showed the photographs to his client in order to prepare her for her dissolution case, the conduct caused his client to feel uncomfortable and destroyed the attorney-client relationship.

attorney Stanley Wiles. *In re Wiles*, 107 S.W.3d 228 (Mo. banc 2003). Attorney Wiles had been previously admonished for four diligence violations, five communication violations, one safeguarding client property violation, and one violation for engaging in conduct prejudicial to the administration of justice. *Id.* at 229. And, he had received two more admonitions from Kansas disciplinary authorities. *Id*. at 229. The opinion did not describe the new conduct that led to discipline, other than noting that Mr. Wiles had been censured in Kansas. *Id*. at 228.

The more recent decision involving probation provides additional guidance. In that 2009 opinion, the Court ordered probation for Missouri attorney Larry Coleman. *In re Coleman*, 295 S.W.3d 857 (Mo. banc 2009). Mr. Coleman had been admonished in 1990 for violations involving communication and unreasonable fees. Later, in 1999, he was admonished for diligence and communication violations. Finally, in 2008, the Court publicly reprimanded him for violations regarding diligence, unreasonable fees and conduct prejudicial to the administration of justice. *Id*. at 859. In the 2009 case leading to probation, the Court found that Mr. Coleman violated several rules, including Rule 4-1.15(c) by commingling his own funds with client funds and by failing to keep adequate accounting records.

The *Coleman* and *Wiles* decisions support the use of probation for Respondent in this case with regard to his violation of the safekeeping property rule. The probation rule (Rule 5.225) has been effective since 2003. Informant firmly supports the concept of retraining lawyers while on probation and believes that probationary conditions are, in many cases, more likely to improve a lawyer's practices (and thereby protect the public)

than will a reprimand. With regard to Respondent's violation of Rule 4-1.15(c), Informant believes that probation is likely to help improve his practice and protect future clients.

ABA Sanction Standards

The Court routinely relies on the ABA Standards for Imposing Lawyer Sanctions for guidance in determining the appropriate discipline. *In re Coleman*, 295 S.W.3d 857, 869 (Mo. banc 2009). At the outset, the ABA's guidelines consider the lawyer's duties, mental state, and the potential or actual injury caused by the misconduct. Upon the completion of that analysis, aggravating and mitigating circumstances should be considered. Finally, the ultimate sanction imposed should at least be consistent with the sanction for the most serious instance of misconduct among a number of violations. ABA Standards for Imposing Lawyer Sanctions (Theoretical Framework) (1991 ed.).

The most serious misconduct in the case at bar is Respondent's conflict of interest stemming from his unwanted sexual advances directed at his client Danels. According to the applicable ABA Standards, (i) disbarment is appropriate when the lawyer knows that the lawyer's interests are adverse to the client's with the intent to benefit the lawyer and causes serious or potentially serious injury to the client, (ii) suspension is appropriate when the lawyer knows of a conflict of interest and does not disclose to the client the possible effect of that conflict and causes injury or potential injury to the client, and (iii) reprimand is appropriate when the lawyer is negligent in determining whether a conflict exists and causes injury or potential injury to the client. **Standards 4.31, 4.32 and 4.33.**

Informant submits that Respondent acted knowingly in showing photos of naked women to his client and in making crude and suggestive comments to her. In addition, actual injury resulted from Respondent's conduct in that his client Danels chose to terminate the attorney-client relationship rather than subject herself to continued sexual advances by Respondent. As a result, she was forced into a situation where she chose to represent herself in her pending dissolution case.

Informant submits that the following aggravating circumstances are present with regard to Respondent's conflict arising from his unwanted sexual advances toward his client: selfish motive [**Standard 9.22(b)**]; multiple offenses [**Standard 9.22(d)**]; vulnerability of the victim [**Standard 9.22(h)**]; and Respondent's substantial experience in the practice of law [**Standard 9.22(i)**].

Informant submits that the following mitigating circumstances are present with regard to Respondent's conflict of interest arising from his unwanted sexual advances toward his client: absence of a prior disciplinary record [**Standard 9.32(a)**].

Based on the foregoing, Informant believes that a proper analysis of the ABA Standards regarding Respondent's conduct in engaging in a conflict of interest with his client Danels through unwanted sexual advances warrants suspension.

In the event that the Court accepts Respondent's explanation for showing photographs of naked women to his client (i.e., that it was a "common practice" that he used in order to show his client what could happen in a dissolution case) **App. 58 (Tr. 164-165)**, then the most serious misconduct is Respondent's failure to protect his various

clients' advance fee payments by placing them in his operating account in violation of Rule 4-1.15(c).

Most trust account violations result in disbarment, suspension or stayed suspension with a period of probation intended to improve the attorney's practice methods. In the instant case, disbarment is not appropriate because there is neither evidence of intentional theft nor evidence that Respondent knew or should have known that he was commingling and using client funds. See ABA Standard 4.11 and *In re Williams*, 711 S.W.2d 518 (Mo. banc 1986). And, under the ABA Standard 4.12, it appears that suspension is the default sanction. ABA Standard 4.12 sets the bar at suspension for commingling when a lawyer knows or should know that he is dealing improperly with client money and causes injury or potential injury to a client. Respondent knew that he was placing advance fee payments into his operating account with his own funds. It does not appear, however, that he knew his placement of clients' advance fee payments into his operating account was inherently improper. As to harm, Informant takes the position that commingling client and personal funds inherently creates injury or potential injury to a client. At the least, client funds become subject to an attorney's creditors' attachment efforts when they are commingled.

Informant believes that a stayed suspension with probation is an adequate and appropriate sanction for Respondent's commingling of client and personal funds. First, Respondent has no previous discipline. *See* ABA Sanction Standard 9.32(a). Second, and more importantly, Informant believes that Respondent's operating and trust accounting methods can be improved by training and monitoring. Third, no evidence of

intent to either steal or borrow from his clients has been discovered. Informant discovered no evidence that Respondent attempted to deceive his clients or the Office of Chief Disciplinary Counsel. *See* ABA Sanction Standard 9.32(a). Finally, Respondent has admitted his misconduct with regard to the improper handling of clients' advance fee payments and has already taken steps to correct his accounting practices through a trust accounting seminar and the purchase of a new accounting software system. Under these circumstances, Informant believes that Respondent's violation of Rule 4-1.15(c) can be adequately addressed through a period of probation and monitoring by the OCDC.[5]

Respondent engaged in other acts of professional misconduct. With regard to his representation of John Ray, Respondent (i) failed to timely file a motion to prevent relocation of Ray's minor children in violation of Rule 4-1.3 (diligence), (ii) failed to provide competent representation to Ray in violation of Rule 4-1.1 (competence), and (iii) failed to communicate with Ray regarding the relocation proceedings in violation of Rule 4-1.4 (communication). In addition, Respondent either permitted or directed his

[5] Should the Court decide to place Respondent on probation, then Informant believes that the following probationary terms would be appropriate: probation monitor (OCDC); quarterly reporting responsibility; compliance with the Rules of Professional Conduct; attendance at Ethics School and the Solo and Small Firm Conference; obtaining legal malpractice insurance; compliance and quarterly reporting regarding the proper handling of client and third party funds; client trust account audits by the OCDC; costs of probation to be paid by Respondent.

office staff to serve Christoph Arnold, a prospective client, with service of process in a case where he already represented the adverse party in violation of Rule 4-1.18 (duties to prospective client) and Rule 4-5.3 (responsibilities regarding nonlawyer assistants). While these violations may arguably be of lesser magnitude than the violations involving unwanted sexual advances and trust account violations, they at least constitute aggravating circumstances that the Court should consider in determining the appropriate sanction in this case.

CONCLUSION

Informant asks the Court to find that Respondent violated Rule 4-1.7 by expressing sexual interest in his client and making unwanted sexual advances toward his client, thereby creating a concurrent conflict of interest between his interests and the interests of his client. Informant also asks that the Court suspend Respondent's law license indefinitely. He should not be eligible for reinstatement for at least six months.

Alternatively, Informant asks the Court to suspend Respondent's law license indefinitely, stay the suspension, and place Respondent on probation for a period of two years under the terms and conditions described in footnote 5, *supra*, for his commingling of client and personal funds in violation of Rule 4-1.15(c).

Finally, Informant asks the Court to tax all costs in this matter to Respondent, including a $1,000.00 disciplinary fee pursuant to Rule 5.19(h).

Respectfully submitted,

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ATTORNEYS FOR INFORMANT

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of December, 2013, a true and correct copy of the foregoing was served via the electronic filing system pursuant to Rule 103.08 on:

Thomas D. Carver
Attorney for Respondent
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Springfield, MO 65806

_____
Alan D. Pratzel

CERTIFICATION: RULE 84.06(c)

I hereby certify to the best of my knowledge, information and belief, that this brief:

1. Includes the information required by Rule 55.03;

2. Complies with the limitations contained in Rule 84.06(b);

3. Contains 8,119 words, according to Microsoft Word, which is the word processing system used to prepare this Brief; and

_____
Alan D. Pratzel